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NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, DC

RE: Initial Findings and Draft Recommendations of the NEPA Task Force

Dear Chairwoman McMorris and Members of the Task Force:

On December 21, 2005, a Task Force of the House Committee on Resources issued *Initial Findings and Draft Recommendations* ("DR") that propose numerous troubling alterations to the National Environmental Policy Act ("NEPA" or "Act") and its regulations. On its own behalf and on behalf of the Southern Appalachian Forest Coalition, Chesapeake Bay Foundation, Wild Virginia, Virginia ForestWatch, North Carolina Audubon Society, North Carolina Coastal Federation, and South Carolina Coastal Conservation League, the Southern Environmental Law Center submits the following comments regarding the NEPA Task Force's draft report.

The Task Force puts forth a series of sweeping, distressing proposals that would dramatically alter settled NEPA law without explaining to the public the full implications of such alterations. On a whole, the proposals are misguided, misinformed, and under a guise of "updating" the Act, seek to unravel its core procedural safeguards. The proposals run the full gamut: from the wholly unnecessary to the radical. It is, moreover, deeply disturbing to observe the Task Force proposing mechanisms that would leverage NEPA against public-interest groups and ordinary citizens in favor of corporate interests.

As the Task Force considers how to proceed, it should take note that a candid final report would inform the public about existing NEPA provisions and principles and about how these operate. A candid final report would then explain to the public how specific Task Force proposals would add to or modify the existing legal framework. For example, the Task Force proposes to shorten the applicable statute of limitations to file a NEPA challenge from 6 years to 6 months, but the Task Force never informs the public about the current 6-year period or the reasons for so drastically shortening the period. If the Task Force continues with this process, public understanding would be vastly enhanced if the Task Force conducted a side-by-side comparison of its proposals and existing NEPA law. It is imperative that the public understand how the proposals compare to existing law and how the proposals would specifically change the existing law. Moreover, the Task Force should specifically disclose the motives or purposes behind each proposal and should explain to the public how its proposals would accomplish those objectives.

The following comments will address specific Task Force recommendations in sequential order. The issue of "cumulative impacts," however, merits special attention, and therefore it will be addressed first.

Recommendation 8.2

The Task Force proposes to rewrite 40 C.F.R. § 1508.7 to exclude the impacts of "reasonably foreseeable" future actions from the definition of "cumulative impact." DR at 28-29. Without providing any evidence to support the necessity or wisdom of such a revision, the Task Force simply indicates that the cumulative impacts analysis should be limited to "concrete proposed actions."

As currently implemented, NEPA requires agencies to consider "the incremental impact of the [proposed] action when added to other past, present, and *reasonably foreseeable future actions* regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (definition of "cumulative impact") (emphasis added). Inherent in this definition is a basic awareness that the environmental effects of a given action do not take place in a vacuum but in a context with other actions. The inclusion of "reasonably foreseeable future actions" in this definition reflects the common-sense principle that an agency must explain how impacts of a proposed action will combine with other future impacts to result in "incremental" impacts to the environment.

Courts have noted that the phrase "reasonably foreseeable" does not mean guesswork into a realm of "effects that are highly speculative or indefinite." *W. N.C. Alliance v. N.C. DOT*, 312 F. Supp. 2d 765, 771 (E.D.N.C. 2003). Rather, "reasonably foreseeable is properly interpreted as meaning that the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Id.* (citation omitted). Although it seems clear that we should expect no less of our government than of "a person of ordinary prudence," Recommendation 8.2 would invite, and indeed require, the government to fall below even this most basic expectation.

Recommendation 8.2 would also provide a perverse incentive to federal agencies. Under current regulations, agencies may not ignore "reasonably foreseeable" future actions, whether or not those actions have been formally proposed. In order to avoid a thorough cumulative impacts discussion, agencies would be encouraged by Recommendation 8.2 to artificially segment their actions. Through segmentation, agencies could ensure that actions with cumulative impacts would not be concurrently proposed. In the absence of concurrent "concrete proposals," the cumulative impacts analysis would largely wither under Recommendation 8.2.

Recommendation 1.1

In the "findings" portion of the draft report, the Task Force remarks that "agencies are defaulting to the preparation of an EIS without fully debating whether or not the action is 'major' as currently set forth in regulations." DR at 9. Assuming this assertion is correct, a prudent response would be to provide agencies with the guidance and expertise to better implement the current regulations. Instead, Recommendation 1.1 of the Task Force proposes to undercut the

existing regulatory scheme by creating a new statutory definition for "major federal action." This move would needlessly disrupt effective NEPA implementation.

The proposed statutory definition would redefine "major federal action" as only a "new and continuing project that would require substantial planning, time, resources, or expenditures." DR at 25. The draft report fails to inform the public that current regulations define "major federal action" very differently: "Major Federal action includes actions with *effects that may be major* and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly." 40 C.F.R. § 1508.18 (emphasis added). In other words, when determining whether a federal action is subject to NEPA, *see* 42 U.S.C. § 4332(C), agencies must focus on the *significance* of the environmental impacts, not the relative magnitude of the endeavor. The regulatory definition for "significantly," 40 C.F.R. § 1508.27, outlines a detailed, multi-factored approach for making this determination. By shifting agency attention to non-essential factors such as the amount of "planning, time, resources, or expenditures," Recommendation 1.1 would inappropriately distract agencies from the primary consideration of significant environmental effects.

The current regulation declaring that "[m]ajor reinforces but does not have a meaning independent of significantly" succinctly reflects NEPA's intent. The notion of "major" should not be divorced from the significance of the environmental effects. As one court held:

> To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act, i.e., to "attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences." By bifurcating the statutory language, it would be possible to speak of a "minor federal action significantly affecting the quality of the human environment," and to hold NEPA inapplicable to such an action. Yet if the action has a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA; the activities of federal agencies cannot be isolated from their impact upon the environment. This approach is more consonant with the purpose of NEPA . . . .

Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1321-22 (8th Cir. 1974). Recommendation 1.1 appears designed to achieve the strange, incongruous result rejected by the court in this case: so-called "minor" federal actions that nevertheless have a significant effect on the environment would be exempt from review. Actions that significantly affect the environment should not evade NEPA review merely based on a failure to satisfy certain criteria extraneous to the effect on the environment (i.e., "planning, time, resources, or expenditures").

If agencies need further guidance in ascertaining what constitutes "significant" environmental impacts, a focused dialogue could be undertaken with respect to that issue, rather than proposing legislative amendment that could eviscerate the very notion of "significance." In sum, NEPA should not be rewritten in any way that would make the issue of "significant" effects subservient or secondary to other extraneous factors. Recommendation 1.1 must be rejected.

Recommendation 1.2

With Recommendation 1.2, the Task Force proposes to rewrite NEPA to impose mandatory deadlines on the NEPA process. This is unnecessary. Issues of timing can be addressed at the administrative level. In fact, the Council on Environmental Quality ("CEQ") is actively developing a series of administrative-level reforms to streamline NEPA implementation and minimize delay. *See* CEQ, *Actions to Modernize NEPA Implementation*, available at http://ceq.eh.doe.gov/ntf/Actions_to_Modernize_NEPA_Implementation.pdf. A one-size-fits-all deadline scheme is not the answer to making NEPA work better for agencies and the general public. Accordingly, the Task Force should step back and, if inefficiencies exist, allow them to be identified and addressed at the administrative level.

A further concern with the deadline proposal is that it could curtail the public's right to comment on specific agency actions. Many agency actions are scientifically complex and may involve questions of uncertainty and the magnitude of environmental impacts. In such situations, the public's right to comment depends directly on having sufficient time to study the agency's environmental statement, collect additional data, conduct independent analyses if necessary, and prepare intelligent written responses. Occasionally, agencies will grant a modest extension to the comment period where a project is particularly complex or controversial. Mandatory deadlines that could infringe on the public's right to comment should be abandoned. Recommendation 1.2 is also problematic because the Task Force fails to explain how the proposed deadlines would affect the duty to supplement NEPA documentation under certain circumstances. We therefore urge the Task Force to reject the idea of introducing statutorily-mandated deadlines into NEPA.

Recommendation 1.3

Recommendation 1.3 proposes to amend NEPA to establish "unambiguous criteria" and provide "clear differentiation" for categorical exclusions ("CE"), environmental assessments ("EA"), and environmental impact statements ("EIS"). What the Task Force fails to appreciate is that federal agencies have labored, within their own particular areas of expertise, for many years to differentiate actions with significant environmental impacts from those that do not have such impacts. The purview of the Act is already clear and, further, is neither over-inclusive nor under-inclusive: the Act applies, appropriately, to federal actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). When it enacted NEPA in 1969, Congress wisely avoided the folly of attempting to legislate the minutiae and nuances separating "significant" actions from insignificant ones. Amending NEPA to introduce new, purportedly "unambiguous criteria" – the details of which remain largely undisclosed by the Task Force – would throw into disarray the uniquely-tailored NEPA implementation programs of individual agencies and would likely have far-reaching and unintended consequences.

Recommendation 1.3 fundamentally ignores that federal actions are of virtually limitless variety. They come in all shapes and sizes, and have environmental impacts that are equally diverse. Moreover, under certain geographic, temporal or other environmental conditions, a given action may have arguably minor impacts, but under other conditions the impacts could be quite severe. Not only would it be exceedingly difficult – indeed, impossible – for Congress to craft universal standards adequately addressing the incalculable variety of federal activities and

their impacts, but it would be especially inappropriate to do so given the fact individual federal agencies are already charged with executing this task for activities under their jurisdiction.

Existing CEQ regulations guide federal agencies through the process of deciding whether an activity is subject to a CE, EA, or EIS. *See* 40 C.F.R. §§ 1501.3, 1501.4, 1507.3, 1508.4, 1508.9, 1508.27. Of particular importance is 40 C.F.R. § 1507.3, a provision requiring individual agencies to develop and adopt, in coordination with CEQ, specific NEPA implementation procedures. This provision affords agencies the necessary flexibility to fine-tune their NEPA implementation in accordance with their unique organizational objectives and regulatory programs. As one example, the U.S. Army Corps of Engineers has promulgated a series of agency-specific implementation procedures, *see* 33 C.F.R. §§ 230.1 *et seq.*, including descriptions of actions that normally trigger an EIS, EA, or CE, and "emergency actions" where NEPA may be waived altogether, *see* 33 C.F.R. §§ 230.6 – 230.9. *See also* 33 C.F.R. Part 325, App. B. Under the Corps' tailored regulations, numerous types of actions are already subject to categorical exclusions – special categories that the agency has developed by virtue of its unique expertise in water and wetland-related projects.

Recommendation 1.3 evidences not only a misguided proposal to usurp a role better left to agencies, but also an apparent intent to weaken the procedural safeguards of NEPA. The Task Force clearly believes that current NEPA implementation is over-inclusive, subjecting too many projects to the EA/EIS process. Thus, the Task Force favors applying CEs to "temporary activities or other activities where the environmental impacts are clearly minimal ... *unless the agency has compelling evidence to utilize another process*" (emphasis added).

Such a proposal is riddled with problems. First, the term "temporary" is far from "unambiguous." Are sporadic, but intrusive military exercises within sensitive wildlife habitat "temporary" or "permanent"? What about time-limited grazing permits? As described above, determining the significance of a project's environmental impacts is a highly contextual, fact-specific exercise which is better accomplished through case-by-case, agency decisionmaking than broad legislative brushstrokes.

Next, the phrasing of Recommendation 1.3 reflects a mistaken assumption that the environmental impacts of "temporary" activities are "clearly minimal." This is not so. Broad application of CEs to all so-called "temporary" activities would obviously allow many destructive actions to take place free from NEPA review. The focus of NEPA, as already noted, is to conduct environmental reviews based on the significance of the impact, not based on whether the action might meet or exceed some arbitrary temporal factor.

Further, the proposal's intent to exempt "activities where the environmental impacts are clearly minimal" is wholly unnecessary: CEQ regulations already authorize categorical exclusions for actions "which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. The Task Force provides little assurance that Congress – rather than the agencies – would have the requisite expertise to accurately distinguish instances where impacts are "clearly minimal" from instances where they are not.

Finally, the Task Force wrongly establishes a presumption that CEs are to be used "unless the agency has compelling evidence to utilize another process." As the Task Force is aware, activities affecting the environment sometimes involve questions of scientific uncertainty. One of the many benefits of NEPA review is the opportunity to collect data, ask questions, and, ideally, resolve issues of uncertainty. Indeed, the very purpose of preparing an EA is to ascertain whether the impacts of a given action will be significant. Where an agency perceives the need to submit a particular project to NEPA review, in order to ascertain its impacts, the agency should not be prohibited by a lack of "compelling evidence." Such an evidentiary standard erodes the longstanding principle of NEPA that, in the face of uncertainty, it is better for agencies to ask questions, invite scrutiny, and seek answers than to shut their eyes and proceed blindly. This evidentiary standard cuts not only against agencies, but also against average citizens. Where the government refuses to submit a project to NEPA review – possibly a project with inherent scientific complexities and uncertainties – this provision would unfairly shift the same evidentiary burden to citizens. In order to overcome the government's decision to utilize a CE, average citizens would have to assemble a body of "compelling evidence." If one of the purported goals of the Task Force is to foster public participation in the NEPA process, heaping unrealistic evidentiary standards on citizens is a surefire way to do just the opposite.

Recommendation 1.3 represents, in short, an unwarranted usurpation of traditional agency functions and a double-edge sword aimed at agencies and the public. To do the same job already accomplished by federal agencies through their development of agency-specific "NEPA implementation procedures," Congress would have to become a prodigious "super agency." Rather than proceed down this path, which would obviously mean neglecting other pressing matters on Capitol Hill, the Task Force should exercise restraint and allow the expert agencies to tackle the intricate task of distinguishing significant impacts from insignificant ones. It is difficult to see any wisdom in dismantling established procedures for creating and applying CEs, *see* 40 C.F.R. §§ 1507.3, 1508.4, only for Congress to replace such procedures with a combination of unnecessary, vague, detrimental criteria and burdensome evidentiary standards that handicap both agencies and the public. Accordingly, the Task Force should take *no* action on Recommendation 1.3.

Recommendation 1.4

By proposing to raise the threshold for triggering NEPA's supplementation requirement, Recommendation 1.4 is another double-edged sword aimed at both agencies and citizens. Although the proposal seems designed to lead readers to believe that the Task Force would merely codify an existing regulatory provision ("This language is taken from 40 CFR 1502.9(c)(1)(i) and (ii)"), the proposed statutory amendment in reality alters crucial wording. The existing CEQ regulation requires an agency to prepare supplemental documentation if: "(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; *or* (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c). Recommendation 1.4 proposes to retain this text, except that it would discreetly change the crucial "*or*" to an "*and*," codifying this change in statute. The effect of this change is obvious. The necessary preconditions for supplementation are amplified to such a degree that supplementation would become an even more rare event than it already is. Also troubling is the

fact that the Task Force provides no reasoned justification for why it seeks to make supplementation more rare, nor does it explain why switching an "and" for an "or" would be the right approach.

In proposing this fundamental alteration, the Task Force fails to perceive that CEQ's regulation, as written with an "or," serves a deliberate and necessary purpose. The Task Force, by now, is well aware that NEPA seeks to foster greater governmental and public understanding of environmental consequences. CEQ's regulation, as written, rightly recognizes that neither government decisionmakers nor the public would be able to adequately understand the impacts of a proposed action if "substantial changes" are made to the project *or* if "significant new circumstances or information relevant to environmental concerns" emerges. Hence, there is a need to supplement an EIS if either of these conditions obtains.

To illustrate the wisdom of the current regulation – and the folly of Recommendation 1.4 – consider the following realistic example of a highway construction proposal. Relevant agencies undertake and complete a legally-sound NEPA review; a final EIS is issued, and a preferred alternative is selected. Due to unforeseen budgetary constraints, however, the project is put on the backburner for several years. Suppose that officials then learn that a previously undiscovered population of an endangered species occupies territory along the right-of-way; or suppose it is learned that the right-of-way crosses a previously undiscovered hazardous waste dumping ground. Under the CEQ regulation, these newly discovered, and clearly important, environmental factors would constitute "significant new circumstances or information," triggering the supplementation duty. But under Recommendation 1.4, assuming no "substantial changes" were made to the construction plans, there would be no duty to supplement the EIS. No supplementation means that the agency is permitted to remain absolutely blind to undeniable, real-world consequences.

Rewording the established criteria for supplementation would harm agencies and the public alike. Citizens have long relied on 40 C.F.R. § 1502.9(c) to apprise agencies of new circumstances or information that justify another look at a particular project. Under Recommendation 1.4, agencies would be authorized to turn a deaf ear even to citizens proffering solid, credible "new information" regarding avoidable environmental consequences. Of course, granting agencies the liberty to be ignorant of the consequences of their actions is no favor to the agencies either. Recommendation 1.4, however, appears to go one step further. It would limit, by statute, supplementation only to instances where both of the aforementioned preconditions are satisfied – a change that could also strip an agency of its discretion to prepare supplements "when the agency determines that the purposes of the Act will be furthered by doing so." 40 C.F.R. § 1502.9(c)(2). Apparently, the Task Force intends not merely to grant agencies the liberty to stick their heads in the sand, but also to *require* them to do so. Recommendation 1.4 is therefore so greatly out of touch with the purposes and principles of NEPA that it should be summarily dropped from consideration.

Recommendation 2.1

With Recommendation 2.1, the Task Force advocates for new regulatory changes that would require federal agencies to give more weight to "the issues and concerns raised by local

interests" than to "comments from outside groups and individuals who are not directly affected by" the proposed action. DR at 26. This proposal simply misapprehends the way in which NEPA operates. While NEPA rightly gives all parties, far and wide, an opportunity to comment on a particular project, the statute envisions that agencies will conduct an open, thorough environmental analysis and make decisions in light of this analysis. The statute plainly does not authorize agencies to arrive at decisions by lending greater emphasis, weight, or credibility to the views of "local interests." Under NEPA, agencies must consider and respond to all comments from the public. 40 C.F.R. § 1503.4. Agency response to public input should be guided not by the input's provenance, but by its objective merit – i.e., the extent to which the comments help elucidate the relevant environmental issues under consideration. NEPA, in short, strives towards objectivity and candor; assigning greater "weight" to one segment of the public over another does nothing to promote – and would likely impede – NEPA's mission. Recommendation 2.1, therefore, should be rejected.

Recommendation 2.2

Under its objective of "Enhancing Public Participation," the Task Force recommends that NEPA be amended "to codify the concept that an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects." DR at 26. While environmental groups have consistently favored concise, intelligible NEPA documents, there is no reason to think that a statutorily-mandated page limit is the proper tool to enhance public participation. Long NEPA documents are not the greatest deterrent to public participation. More concerning than a 1,000-page EIS is a pervasive public sentiment that many agencies approach NEPA in a merely perfunctory manner and fail to uphold the requirement that an EIS be used as a decision-*making* – not decision-*justifying* – tool. Mandating that EISs be shorter will not make them more sound, either scientifically or legally. Other facets of NEPA implementation (e.g., agency dismissal of citizen-generated alternatives) erode public confidence in the process to a far greater degree than the size of the documents. The Task Force, if it chooses to do anything at all, should focus on the larger issue of lack of public confidence in the NEPA process.

Recommendation 3.1

Recommendation 3.1 proposes to expand the availability of "cooperating agency status" to "any tribal, state, local, or other political subdivision that requests" it. DR at 26. The request could only be denied upon a showing of "clear and convincing evidence." The problem with the provision is that it is too broadly worded, and its evidentiary threshold for denying a cooperating-agency request is set needlessly high.

Existing CEQ regulations (40 C.F.R. § 1501.6) and CEQ guidance[1] already encourage the participation of cooperating agencies, but do so in more responsible way than Recommendation 3.1. Although recognizing that cooperating agencies can be of value to the NEPA process, the CEQ has indicated that this status should be limited to entities (federal or non-federal) that have jurisdiction by law or special expertise with respect to the environmental issues. Clearly, there is logic in granting cooperating agency status to parties who can contribute substantively to the

[1] *See* January 30, 2002 CEQ Memorandum, *available at* http://ceq.eh.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html (last visited Feb. 6, 2006).

NEPA process, either by virtue of their jurisdiction by law or their special expertise. By contrast, opening up cooperating agency status to virtually any local stakeholder could lead to a disorderly, dysfunctional NEPA process. Under the Task Force's proposal, the number of cooperating agencies for a given project could be unlimited and, therefore, make the process exceedingly unworkable.

Recommendation 3.2

Here the Task Force proposes to allow state environmental reviews that are "functionally equivalent to NEPA requirements" to constitute compliance with those requirements. DR at 26. Elsewhere in the draft report, however, the Task Force declares a need to study state "mini-NEPAs" to determine how the state and federal laws interact and whether there is duplication and overlap between state and federal laws. Recommendation 9.3, DR at 29. In keeping with NEPA's "look before you leap" philosophy, it would seem prudent for such studies to be conducted before the Task Force proposes to institute reforms based on certain untested assumptions about the relationship between NEPA and state laws. An additional concern is that it would be administratively inefficient to require the federal government to make countless determinations of "functional equivalence." It would likely be easier for individual states to align their environmental review processes with the federal process and, if they so choose, institute a policy of "functional equivalence" at the state level.

Recommendation 4.1

Recommendation 4.1 contains several troubling proposals, each of which is discussed in more detail below. As a general matter, the recommendation suggests that a sweeping, restrictive citizen suit provision is needed "to address the multitude of issues associated with NEPA litigation." Individually and collectively, the various proposals under Recommendation 4.1 aim to deter citizen enforcement of NEPA. Such a measure would only further empower recalcitrant agencies and affluent corporations – and do so at the expense of ordinary citizens and environmental quality.

This drastic measure also can not be squared with the facts before the Task Force. As acknowledged by the draft report, citizen enforcement of NEPA is attempted very rarely; *only about 0.2% of NEPA documents become the subject of litigation.* Lacking empirical evidence of a real problem, the Task Force alludes to some vague notion that even the infinitesimal amount of NEPA litigation, relative to the entire federal civil docket, can wreak widespread economic havoc (*see, e.g.*, DR at 12, "ripple effect of lost economic opportunities"). It appears, in short, that Recommendation 4.1 is a solution in search of problem.

Best Available Information and Science

Good data, objective analyses, and scientific integrity are core elements of NEPA implementation. Amending NEPA to require plaintiffs "to demonstrate that the evaluation was not conducted using the best available information and science" is unnecessary and detrimental to civic involvement in the NEPA process.

Agencies' NEPA decisions have been historically reviewable pursuant to the Administrative Procedure Act, which authorizes the judiciary to set aside only those decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Currently, the law requires any party challenging a NEPA decision to carry the burden of demonstrating that the decision was arbitrary or capricious. *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995); *Monroe County Conservation Council v. Adams*, 566 F.2d 419, 422 (2d Cir. 1977); *Fla. Keys Citizens Coalition v. U.S. Army Corps of Engineers*, 374 F. Supp. 2d 1116, 1153 (S.D. Fla. 2005); *Fund for Animals v. Mainella*, 283 F. Supp. 2d 418, 419 (D. Mass. 2003); *VT PIRG v. U.S. Fish & Wildlife Service*, 247 F. Supp. 2d 495, 505 (D. Vt. 2002). The "arbitrary and capricious" review standard is considerably deferential, affording agencies substantial leeway in the exercise of their professional judgment. *See Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983); *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004). Moreover, federal agencies have received repeated assurances that courts are not in the business of second-guessing or flyspecking environmental reviews. *E.g., Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 185-86 (4th Cir. 2005).

Under the APA standard, a challenging party must try to persuade a court that the agency: "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In view of the deference already accorded to agencies, it is unjustifiable to amplify the existing burden on plaintiffs. The "best information" proposal is especially unjustifiable considering that the Task Force cites no evidence that would indicate that courts allow plaintiffs to undercut agency NEPA decisions based on dubious information. Again, the Task Force offers a proposal that seems targeted at a non-existent problem.

Moreover, courts have operated under an APA-review regime now for several decades and have become adept at recognizing when an agency decision is so implausible, so irrational, or so unsubstantiated that the "arbitrary and capricious" threshold is crossed. Introducing a new, absolutist criterion – i.e., "best available information and science" – will not only disturb settled law, but also require the courts to become arbiters of what constitutes the "best" information. Considering that scientists themselves do not always agree on what information is the "best," how can the Task Force expect courts to make such a determination?

Such a provision would also unfairly frustrate citizen enforcement of NEPA. A prime objective of NEPA is the identification and evaluation of *all* credible, relevant information. Citizen enforcement of NEPA ensures that agencies do not selectively cherry-pick information to justify a favored course of action. Erecting a "best information" hurdle would serve as a shield behind which agencies would be allowed to dismiss relevant evidence on grounds that the information was not the "best." Congress has long recognized that citizen participation is crucial to the integrity and effectiveness of NEPA and other laws. For this reason, the Task Force should not establish additional statutory barriers that would only stifle citizen participation.

Standing – "Involved Throughout the Process"

Another needless barrier to citizen enforcement is the vaguely-worded proposal to deny standing to parties who have not been "involved throughout the process." As an initial matter, it is difficult gauge what the Task Force means by "involved throughout the process." NEPA processes do not always unfold in a simple linear fashion. An agency could prepare an EA/FONSI for a particular project, but then it might shelve the project, perhaps returning several years later to prepare an EIS. In such an instance, does the Task Force seek to deny standing to any party who was not "involved" from the earliest stages of the EA?

The Task Force also does not elucidate the specific problem that such a limitation on standing is meant to address. By proposing such a measure, it would seem the Task Force believes that current constitutional and prudential standing limitations are not adequate "gatekeepers" and, as a result, improper parties are gaining access to the courts. Yet the Task Force cites not a shred of evidence that would support such a belief. Rather than proposing a specific measure tailored to address a specific problem, the Task Force contents itself with announcing a sweeping denial of standing.

The proposal is anti-citizen. The federal bureaucracy is huge and vast, undertaking myriad actions on a relentless basis. Most citizens, of course, do not have the time or the resources to comprehensively monitor every government action, every step of the way. Some citizens with aligned interests organize themselves into groups, but, again, such citizens groups are generally lacking in the requisite staff and resources to watchdog every move the government makes. Given these realities, it is both fundamentally unnecessary and unfair to seek further limitations on civic involvement in the NEPA process.

If the Task Force's concern is that citizens are blindsiding agencies with lawsuits that raise unforeseen issues, the Task Force certainly provides no evidence of such a problem. Nor could this be a problem, because existing judicial precedent protects agencies from being "sandbagged" by unanticipated NEPA claims. As recently as 2004, in *Department of Transportation v. Public Citizen*, the Supreme Court has reaffirmed the principle that "[p]ersons challenging an agency's compliance with NEPA must structure their participation so that it alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration." 541 U.S. 752, 764 (quotation omitted). In other words, if an agency is not put on notice regarding problems, shortcomings, or other issues with its environmental analysis, courts will not find the agency at fault for any such inadequacies.

Standing – "Clear Guidelines"

The Task Force also proposes to amend NEPA by creating new, "clear guidelines on who has standing to challenge an agency decision." The proposal goes on to state that these "clear guidelines" will be based on "factors such as the challenger's relationship to the proposed federal action, the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge." Unfortunately, though aiming for "clear" guidelines, the Task Force fails to provide any meaningful detail beyond these generically-worded "factors."

This proposal manifests a familiar defect: the Task Force has failed to document an actual problem for which such guidelines would represent a well-defined, targeted solution. Even though the details are still somewhat hazy, these guidelines would broadly restrict citizens' access to the courts.

More troubling than the vagueness of the proposed standing guidelines is the fact that there is no demonstrated need to shoehorn newfangled requirements into the statute. Standing is a matter heavily policed by the courts. Article III of the Constitution and jurisprudential principles already serve as effective gatekeepers to the courthouse. As the Task Force is aware, the federal judiciary exercises due caution, in NEPA and non-NEPA cases alike, to ensure that parties seeking redress satisfy the requisite elements of constitutional and jurisprudential standing. It is untenable – absent a clear, specific need – to propose the rewriting of NEPA with undisclosed standing guidelines that, as presently drafted, are anything but "clear."

Restrictions on Settlement Agreements

The Task Force's proposal to constrain settlement agreements, which only temporarily postpone business activities, sorely misses the point of NEPA. Limiting the availability of injunctive remedies in settlement negotiations is fundamentally antithetical to the statute and puts it on the fast track to becoming a dead letter. Plaintiffs who challenge a NEPA document are fully aware that NEPA, by itself, does not demand any particular substantive outcome. The statute prescribes a procedure which aspires to, but does not mandate, environmentally-positive decisions. As a result, a plaintiff's general goal is to compel the government to take a "hard look" at the environmental consequences of its actions. NEPA indisputably contemplates that a candid, objective, and rigorous environmental review will be completed *before* any underlying activities are carried out. Logically, where the government has failed to fulfill this responsibility, plaintiffs frequently seek forms of injunctive redress. The purpose is not to cause economic hardship to businesses, but rather to ensure that the spirit and letter of NEPA are upheld. NEPA becomes largely meaningless if a proper environmental review happens after decisions are already made and actions already implemented. As one court noted, "the very purpose and protection afforded by NEPA is eradicated if a federal agency makes a decision without proper consideration of the environmental impacts of the proposed project." *Western North Carolina Alliance v. N.C.* DOT, 312 F. Supp. 2d 765, 769 (E.D.N.C. 2003).

It is also odd that the same Task Force which bristles at NEPA litigation would also seek to encumber settlement agreements between the U.S. government and other parties. Prohibiting the U.S. government from entering settlement agreements "that forbid or severely limit activities for businesses" would actually promote litigation and exacerbate the associated costs and delays. As a policy matter, the practice of settling cases should be supported. Settlements save time and money for the parties involved, and also help to conserve scarce judicial resources. By removing the possibility of injunctive redress in many NEPA settlements, plaintiffs are more likely to bypass settlement negotiations and proceed directly to the courthouse. The Task Force's proposal neglects the fact that the U.S. government, as defendant, is most inclined to reach settlements where the merits tilt decidedly in the plaintiffs' favor. Where the merits of a NEPA case are obvious enough to both parties, they will be equally obvious to a judge. To interfere

with the settlement process in such a way that clear-cut cases are more likely to go to trial simply defies common sense and sound public policy.

Finally, this portion of the proposed citizen suit provision is patently unfair to average citizens relative to businesses. Whereas the Task Force seeks to impose strict standing requirements on citizens (must be, *inter alia*, "involved throughout the process"), non-party businesses would be empowered to scuttle a settlement agreement without any showing of having been "involved throughout the process." NEPA as originally enacted was never meant to empower corporations at the expense of citizens and community groups; the Task Force should not attempt to rewrite NEPA in ways which would do precisely that.

180-day Statute of Limitations

As noted above, the Task Force has proposed a 180-day (or approximately 6-month) statute of limitations on NEPA lawsuits, describing it as "a reasonable time period for filing" such a challenge. The Task Force fails to explain to the public how shortening the applicable filing period to 6 months could be considered "reasonable." Nor does the Task Force spell out for the public just how radical this proposed change would be: under existing law, parties are afforded a 6-year period in which to challenge a final agency decision! 28 U.S.C. § 2401(a). Statutes of limitation do, indeed, serve an important function in our judicial system. In general, they keep stale claims out of court and deter parties from springing overdue claims on unsuspecting adversaries. The Task Force's proposal serves neither purpose.

For practical reasons alone, the proposed 6-month statute of limitations is thoroughly unreasonable. Proposed actions subject to NEPA are frequently subject to a range of contingencies, such as funding availability and other approval processes. In some instances, the NEPA process may be concluded well before such contingencies are resolved. While conclusion of the NEPA process suggests that a particular action is likely to be implemented, actual implementation of the action may remain considerably speculative. A 6-month period for filing NEPA challenges will not provide enough time for the material facts in a given case to "ripen," with federal actions often occurring several years after a record of decision is finalized, or sometimes not happening at all. As discussed above, the primary aim of a NEPA lawsuit is to ensure that the government completes a candid and thorough environmental review prior to an action's implementation. It is generally inefficient to file a NEPA suit where actual implementation of the underlying action remains largely hypothetical.

A 6-month statute of limitations would likely result, ironically, in more litigation not less, as plaintiffs would rush to challenge not only "ripe" proposals but also unripe ones. As with the Task Force's proposed interference with settlement negotiations, an unreasonably short statute of limitations would likely promote the needless waste of finite resources by all parties involved: government agencies, the judiciary, and the public. The Task Force should therefore abandon its proposal to insert an overly restrictive statute of limitations into NEPA.

Recommendation 5.1

Recommendation 5.1 proposes to amend NEPA in a way that would allow agencies to disregard alternatives that are not "supported by feasibility and engineering studies." DR at 27. Such a measure is unnecessary, and would undermine both agency implementation and citizen enforcement of NEPA.

Under existing law, agencies are required to consider only "reasonable alternatives." 40 C.F.R. § 1502.14. Since at least 1978, when the Supreme Court decided *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the consideration of alternatives has been "bounded by some notion of feasibility." 435 U.S. 519, 551. Courts adhere closely to the rule that agencies are free to ignore alternatives that are unreasonable, infeasible, or speculative. *E.g.*, *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1207 (9th Cir. 2004); *Utahns for Better Transp. v. United States DOT*, 305 F.3d 1152, 1172 (10th Cir. 2002). Given this existing legal framework, the Task Force should publicly justify the need for a statutory amendment that would narrowly base an alternative's reasonableness on whether it is "supported by feasibility and engineering studies." Yet, similar to other proposals in the draft report, the Task Force musters no evidence to explain the need for such an amendment. This proposed amendment is unnecessary, in light of the fact that existing law amply shelters an agency's decision to disregard unreasonable or infeasible alternatives.

The proposal would also undermine agency implementation and citizen enforcement of NEPA because it erects an illogically high threshold for determining the scope of reasonable alternatives. While feasibility and engineering studies are relevant, important considerations, the stark truth is that such studies are not always available. It would be indefensible to allow an agency to disregard obvious, common-sense alternatives to a proposed action merely due to a lack of feasibility and engineering studies. By allowing and protecting agency decisions to disregard common-sense alternatives, Recommendation 5.1 would no doubt undermine – if not outright destroy – the objectivity and candor that are central to NEPA implementation. In effect, such a provision would enable agencies to define the scope of alternatives based not on their actual reasonableness but on an arbitrary factor: whether some scientists, engineers, or other experts have prepared "studies" to support that alternative.

Recommendation 5.1 would also represent a large-scale preemption of citizen-led efforts to ensure better alternatives' analyses. The measure is blatantly anti-citizen because it imposes an unreasonable burden – i.e., demonstrating an alternative's "reasonableness" by reference to expert "studies" – directly onto citizens who try to proffer reasonable alternatives for consideration. As the Task Force is well aware, citizens and public-interest groups generally do not have the human or financial resources to prepare "feasibility and engineering studies." Lacking the means to obtain such studies, citizens that have common-sense alternatives to offer would be left without recourse, both during the public comment phase and during any subsequent attempt at judicial review.

The following real-world example illustrates why Recommendation 5.1 would be a disaster for ordinary citizens. In the late 1990s, the South Carolina State Ports Authority aggressively pursued plans to construct a huge containership terminal on Daniel Island, in

Charleston Harbor, South Carolina. As project proponent, the port agency objected to suggestions that sites other than Daniel Island could meet its needs. But, without resorting to "feasibility or engineering studies," a large contingent of citizens argued to the U.S. Army Corps of Engineers (the permit-issuing agency) that an abandoned naval base provided a suitable and better alternative. In the end, the port agency scrapped the Daniel Island proposal and re-proposed a new terminal at the abandoned naval base, the very alternative identified by the public. Such a result would be highly improbable, at best, under a statutory provision that limits alternatives based on the availability of "feasibility and engineering studies." We therefore urge that Recommendation 5.1 be rejected.

Recommendation 5.2

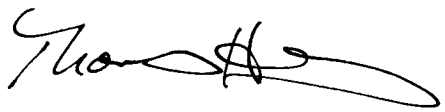
While Recommendation 5.2 is right to recognize that the "no-action" alternative merits an "extensive discussion," any provision that would require rejection of the no-action alternative is simply untenable. Although not formally acknowledged by the Task Force, such a provision would constitute a substantive overhaul of NEPA. As currently written, and in accordance with longstanding judicial precedent, NEPA is a procedural statute. The Supreme Court has recognized NEPA's "broad national commitment to protecting and promoting environmental quality," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), but has also repeatedly stressed that the statute "imposes only procedural requirements," not substantive outcomes, *Dep't of Transport. v. Public Citizen*, 541 U.S. 752, 756 (2004).

The proposal to rewrite NEPA to compel agencies to reject a certain alternative signifies the Task Force's belief that NEPA should be converted from a procedural statute into one that requires certain substantive outcomes. Alarmingly, the alternative that is designated for rejection is the "no-action" alternative, which in many situations will likely be the most environmentally positive course of action. Thus, the Task Force not only seeks to convert NEPA into a substantive statute, but also a statute that would substantively favor environmentally harmful outcomes. By mandating the rejection of a certain alternative, this provision also infringes impermissibly on the independent judgment and discretion of agencies. In short, Recommendation 5.2 is largely the antithesis of NEPA, far from a "modest" reform. This recommendation must receive no further consideration.

* * * *

Thank you for the opportunity to submit these comments. We would be happy to answer any questions you might have about the content of our comments, and look forward to helping fulfill NEPA's purpose of informed federal decisionmaking.

Sincerely,



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